Grey Advertising (M) Sdn Bhd v Wong Yoke Ying & Anor

HIGH COURT (KUALA LUMPUR) — JUDICIAL REVIEW NO R1-25-160 OF 2003
RAUS SHARIF J
11 MAY 2006

Labour Law — Employment — Dismissal — Constructive dismissal — Respondent a Financial Manager reporting to Managing Director — Recruitment of a new Finance Director whom respondent supposed to report to — Whether Industrial Court justified in concluding that the case before it was related to performance

This is an application by Grey Advertising (M) Sdn Bhd ('applicant') for an order of certiorari to quash the Industrial Court Award No 551 of 2003, handed down by the Industrial Court on 22 July 2003. In the award, the Industrial Court held that the first respondent had been constructively dismissed and awarded her a total sum of RM388,000.00. The first respondent joined the applicant with effect from 1 March 1978 as an Account Assistant. She was subsequently promoted as an Accountant with effect from 1July 1986. In December 1989, she was again promoted and this time to the post of Financial Manager reporting to the Managing Director. On 27 September 1999, the Managing Director of the applicant wrote to the first respondent (following a performance appraisal session with the first respondent the previous day) expressly informing the first respondent of the appointment of a new Finance Director, whereby she would have to report to the Finance Director instead of the Managing Director. In effect, she would no longer be the Head of Finance Division. The applicant's contention was that the company merely wanted to recruit a Finance Director whose role would cover broader financial management issues as per the original job description designed for the Head of Finance Unit.

Held, dismissing the application:

(1) It is clear that the applicant had failed to substantiate the contention or defence because the applicant had failed to adduce the necessary original job description which it claimed it wanted the new Finance Director to fulfill for the Industrial Court to consider (see para 12).

(2) The findings of the Industrial Court were based on evidence. It would be contrary to all the established legal principle relating to judicial review if the findings of facts based upon the evidence presented were liable to be reopened or reevaluated by this court. The Industrial Court was justified in concluding that the case before it was related to performance and not a case where the first respondent had prematurely walked out of her job (see para 15).

(3) The Industrial Court had not applied the wrong test for constructive dismissal. It had correctly identified the proper legal principle and the law applicable on

cases of constructive dismissal. It is clear that the Industrial Court had applied the contract test as laid down in the case of *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92 (see para 16).

[Bahasa Malaysia summary

Ini ialah permohonan oleh Grey Advertising (M) Sdn Bhd ('perayu') untuk satu perintah certiorari untuk membatalkan award Mahkamah Perindustrian No 551 Tahun 2003 yang diberikan oleh Mahkamah Perindustrian pada 22 Julai 2003. Dalam award tersebut, Mahkamah Perindustrian memutuskan bahawa responden pertama telah dipecat secara konstruktif dan mengawardkannya jumlah RM388,000.00. Responden pertama menyertai perayu sebagai seorang Penolong Akaun pada 1 Mac 1978. Beliau seterusnya dinaikkan pangkat ke akauntan bermula dari 1 Julai 1986. Pada Disember 1989, beliau sekali lagi dinaikkan pangkat dan kali ini ke jawatan Pengurus Kewangan melaporkan kepada Pengarah Pengurusan. Pada 27 September 1989, Pengarah Pengurusan perayu menulis kepada responden pertama (berikutan satu sesi penelitian pencapaian dengan responden sehari sebelum itu) memberitahu responden pertama bahawa akan terdapat satu pelantikan baru Pengarah Kewangan, dimana responden dikehendaki melaporkan kepada Pengarah Kewangan dan bukan lagi kepada Pengarah Pengurusan. Dengan itu, beliau bukan lagi Ketua Bahagian Kewangan. Pendapat perayu ialah syarikat tersebut hanya ingin mengambil seorang Pengarah Kewangan yang mana peranannya ialah untuk meliputi isu-isu pengurusan kewangan yang lebih luas seperti yang dikehendaki oleh penjelasan kerja yang asal yang telah dirancang untuk Ketua Unit Kewangan.

Diputuskan,menolak permohonan tersebut:

(1) Adalah jelas bahawa perayu telah gagal mengukuhkan pengataan atau pembelaan mereka oleh kerana perayu telah gagal mengemukakan penjelasan kerja yang asal, yang dikatakan dikehendaki ditunaikan oleh Pengarah Kewangan yang baru untuk ditimbangkan oleh Mahkamah Perindustrian (lihat perengggan 12)

(2) Penemuan Mahkamah Perindustrian adalah berdasarkan bukti. Adalah bertentangan dengan prinsip undang-undang yang mantap berhubungan dengan kajian semula kehakiman sekiranya penemuan fakta-fakta berdasarkan bukti yang dikemukakan dibuka dan dikaji semula oleh mahkamah ini. Mahkamah Perindustrian adalah adil dalam memutuskan bahawa kes ini berkaitan dengan pencapaian dan bukan satu kes dimana responden pertama telah keluar secara pra masa daripada kerjanya (lihat perenggan 15).

(3) Mahkamah Perindustrian tidak menggunakan ujian yang salah dalam pemecatan secara konstruktif. Ia betul dalam mengenalpasti prinsip undang-undang yang sewajarnya dan undang-undang yang harus dipakai dalam kes-kes pemecatan secara konstruktif. Adalah jelas bahawa Mahkamah Perindustrian memakai ujian kontrak seperti yang dinyatakan di dalam kes *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92 (lihat perenggan 16).]

Notes

For cases on dismissal, see 8(1)*Mallal's Digest* (4th Ed, 2003 Reissue) paras 849–873.

Cases referred to

Wong Chee Hong v Cathay Organisation (M) Sdn Bhd [1988] 1 MLJ 92 (refd)

Legislation referred to

Rules of the High Court 1980 O 53

T Thavalingam (Zaid Ibrahim & Co) for the applicant.
LG Seah (Lobo & Associates) for the first respondent.

Raus Sharif J:

[1] This is an application by Grey Advertising (M) Sdn Bhd ('applicant') for an order of certiorari to quash the Industrial Court Award No 551 of 2003, handed down by the Industrial Court on 22 July 2003. In the award, the Industrial Court held that the first respondent had been constructively dismissed and awarded her a total sum of RM388,000.00 comprising the following:

(a) Backwages from the date of dismissal (13 October 1999) till the last date of hearing (12 November 2002) subject to a maximum of 24 months
RM8,000.00 x 24 = RM192,000.00

(b) Payment in lieu of reinstatement on the basis of one month salary for each year of completed service (1 January 1978 till 13 November 2002):
RM8,000.00 x 24 ½ = RM196,000.00

[2] The relevant facts leading to this application are these. The first respondent joined the applicant with effect from 1 March 1978 as an accounts assistant. She was subsequently promoted as an accountant with effect from 1 July 1986. In December 1989, she was again promoted and this time to the post of Financial Manager reporting to the Managing Director.

[3] On 27 September 1999, the Managing Director of the applicant, Mr John Burbidge (COW 1) wrote to the first respondent (following a performance appraisal session with the first respondent on the previous day) expressly informing the first respondent of the following:

(i) that he wanted to revise her job description and appoint a new Finance Director or 'someone else' to whom the first respondent had to report;

(ii) that the new appointee will assume overall responsibility for financial management.

[4] The first respondent considered the action of COW 1 to be a fundamental breach of her contract of employment and therefore considered herself dismissed by the applicant.

[5] The Industrial Court found in favor of the first respondent. Hence, this application by the applicant.

[6] Before me, it was submitted by the applicant that the Industrial Court erred on the following:

(a) Took into account irrelevant considerations when it held that the applicant's case before it was related to the performance of the first respondent when it was a case where the first respondent had prematurely walked out on constructive dismissal without any basis.

(b) Acted on no evidence when it:

(i) held that the first respondent was requested to reduce her job function;

(ii) held that the appointment of Finance Director amounted to the applicant evincing an intention no longer to be bound by the contract of employment; and

(iii) held on no basis that discussing the first respondent's terms and conditions with her meant that her terms of employment in the future would be reduced.

(c) Failed to take into account relevant considerations in that it failed to appreciate that there was at the material time no change to the first respondent's duties and responsibilities.

(d) Wrongly applied the law of constructive dismissal and compared the current facts to the case of *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92.

[7] The first respondent refuted the applicant's contentions and basically contended that the Industrial Court's award was proper and valid and does not merit judicial review intervention.

[8] It is trite law in a constructive dismissal claim that the burden lies on the first respondent, as an employee, to prove a fundamental breach or an intention on the part of the applicant that it no longer wished to be bound by the contract of employment. In the present case the Industrial Court addressed the issue on the following words:

> … A scrutiny of the claimant's job description for the post of Finance Manager dated 1 April 1997 (exh CO 6A) reveals that she is 'to manage the finances of the company and to be responsible for a department … and to lead the Finance Division …. Further her job description expressly states that her reporting relationship is directly to the Managing Director on all issues on finance. However with the appointment of the new Finance Director, all this will change. It would appear that the company wanted the claimant to agree to a reduction of her job-scope which means that she is being relegated to a position of lesser responsibilities albeit on the same terms and conditions of service. It is therefore clear that the new Finance Director's employment would have a detrimental effect on the claimant's terms of employment.

[9] The Industrial Court further stated as follows:

> … Further her job description expressly states that her reporting relationship is directly to the Managing Director on all issues of finance. However with the appointment of the new Finance Director, all this will change. It would appear that the company wanted the claimant to agree to a reduction of her job-scope which means that she is being relegated to a position of lesser responsibilities …

[10] I have no reason to review the above findings. It is clear that at the material time, the first respondent was the Finance Manager and Head of the Finance Department. With the impending appointment of the new Finance Director, the first respondent's position will be relegated, whereby she has to report to the Finance Director and no longer to the Managing Director. In effect, she will no longer be the Head of Finance Division. Therefore, the applicant's action had a detrimental effect on the first respondent's terms of employment.

[11] It appears to me that the whole tenor of the applicant's contention was that the applicant had merely wanted to exercise its rights as an employer to do what is best for the company. The applicant in its statement in reply pleaded as follows:

> the company had no intention of dismissing her and that it had merely intended to engage a Finance Director whose role would cover broader financial management issues as per the original description designed for the Head of the Finance Unit of the Company …

[12] On the above pleading, the Industrial Court had made a finding of fact that the applicant had failed to substantiate the aforesaid contention or defence because the applicant had failed to adduce the necessary original job description which it claimed it wanted the new Finance Director to fulfill. The Industrial Court said it in the following words:

> As for the issue that the company merely wanted to recruit a Finance Director whose role would cover broader financial management issues as per the original job description designed for the Head of Finance Unit, COW 1 wrote that he had the intention of employing someone who can fulfill the original job description which the claimant had agreed on in July 1996. However this original job description document was not produced and hence the court is unable to compare whether the company had given the claimant less job function that the original description for the position …

[13] To me, the Industrial Court cannot be faulted in coming to the above conclusion. Clearly the applicant had failed to produce the necessary and crucial evidence for the Industrial Court to consider. Accordingly, I find there is no merit on applicant's contention that it had merely wanted to exercise its rights as an employer to do what is best for the company.

[14] On the issue whether this case is a performance related, Industrial Court addressed it in the following words:

> It is pertinent to note that although the company's assertion in its submission that the issue before the court is 'not performance related', the Company's evidence through COW 1 and

COW 2 (the Resource Director) indicates otherwise. COW 1 had stated in the letter of 5 October 1999 that he will review her performance in 3 month's time and in the meantime, he will proceed to employ the Finance Director. COW 2's evidence is that COW 1 was dissatisfied with the claimant's performance of her key responsibilities. Hence, it appears that the company's case is indeed performance related ….

[15] I have no reason to review the above findings. To me, the findings were based on evidence. It would be contrary to all the established legal principle relating to judicial review if the findings of facts based upon the evidence presented were liable to be reopened or reevaluated by this court. Accordingly, I am of the considered opinion that the Industrial Court was justified in concluding that the case before it was related to performance and not a case where the first respondent had prematurely walked out of her job.

[16] Finally, I am of the view that the Industrial Court had not applied the wrong test for constructive dismissal. To me, the Industrial Court had correctly identified the proper legal principle and the law applicable on cases of constructive dismissal. On this issue the Industrial Court held as follows:

The next question that has to be dealt with is whether the company had already evinced an intention no longer to be bound by the terms of the claimant's contract at the time the claimant left the company. COW 1 in his cross-examination agreed that the company wanted to revise the claimant's existing contract of employment with her agreement but had in fact already made up his mind to appoint a new Head of Finance irrespective of her agreement or not. Hence the claimant was left in not a doubt that the Company fully intended to employ a Finance Director and on his appointment there would be a reduction in her terms of employment as a result of the change in job functions. When the claimant requested COW 1 to revoke his direction that she revise and reduce her job description in her letter of 4 October 1999 and the company through COW 1 refused to accede to her request it clearly showed that the company had evinced an intention not to be bound by the contract any longer. The claimant cannot be said to act prematurely and 'jumped the gun' because the company had confirmed it's course of action in the letter of 5 October 1999 (exh CO 10). The court is of the considered opinion that the claimant was entitled to terminate her contract and leave because the company had evinced an intention no longer to be bound by the contract of employment.

[17] The Industrial Court further held:

It is abundantly clear that the company by its conduct had intimated an intention not to be bound any longer by the original and unchanged terms of contract. The claimant had rightfully left the company at that point of time although nothing was actually carried out or implemented yet by the company in the appointment of the Finance Director. As rightfully pointed out by the claimant in her written submission this was what happened to the workman in the Wong Chee Hong's case (above) when he acted on the employer's evinced intention and did not report for the new assignment.

[18] From the above, it is clear that the Industrial Court had applied the contract test as laid down in the case of *Wong Chee Hong*. Hence, the contention of the applicant that the Industrial Court had wrongly applied the law of constructive dismissal is without any basis.

A **[19]** In conclusion, I am of the view that the findings of the Industrial Court were not perverse or irrational. Neither could I say that the findings were based on no evidence or findings that were so unreasonable that no reasonable person with similar circumstance could have arrived at such findings.

B **[20]** Accordingly the applicant's application is dismissed with costs.

Application dismissed with costs.

Reported by Sally Kee

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